Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:2
PLR-104120-18

Date: July 17, 2018

In Re: EIN:

Dear :

TY: Taxable year beginning January 1, and ending December 31,

LEGEND

Taxpayer:

Entity A:

Entity B:

Financial Advisor A:

Financial Advisor B:

Tax Advisor:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Date 6:

Date 7:

Amount A

Amount B

Amount C

Amount D

Amount E

Amount F

Amount G

Amount H

This is in response to a letter dated Date1, requesting an extension of time to file the required election statement to make a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during TY. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

A. STATEMENT OF FACTS

1. TAXPAYER INFORMATION

Taxpayer is the common parent of an affiliated group of corporations that files consolidated federal income tax returns on a calendar year basis. Taxpayer uses an overall accrual method of accounting.

Entity A is included in Taxpayer's consolidated return, which is filed on a calendar year. Entity A, a healthcare company, operates general acute care hospitals and other health care facilities in non-urban communities.

2. FACTS RELATING TO REQUEST

Taxpayer acquired Entity A in a taxable stock purchase on Date 1 (the "Transaction"). On Date 2, Taxpayer formed Entity B to acquire Amount A of the outstanding equity interest in Entity A. Pursuant to a merger agreement entered into by Taxpayer, Entity B, and Entity A on Date 3, Entity B merged with and into Entity A with Entity A surviving the merger. As a result of the merger, Taxpayer became the owner of all of the outstanding common and preferred shares of Entity A for an aggregate consideration of Amount B, subject to certain adjustments, and the Entity A shareholders received a combination of cash and Taxpayer common stock in exchange for their shares of Entity A common stock. The parties did not make an election under section 338 of the Internal Revenue Code.

Pursuant to an engagement letter dated Date 4, Taxpayer engaged Financial Advisor A to provide financial advisory services with respect to a potential transaction involving Entity A (the "Financial Advisor A Engagement Letter"). Under the terms of the Financial Advisor A Engagement Letter, Taxpayer was to pay Financial Advisor A a Amount C fee contingent upon the closing of a qualified transaction as defined in the Financial Advisor A Engagement Letter. Taxpayer was also required to pay Financial Advisor A a non-refundable fee of Amount D upon rendering a fairness opinion, which was creditable against the contingent fee. Prior to the closing of the Transaction, Financial Advisor A rendered a fairness opinion and was paid Amount D by Taxpayer. Upon the closing of the Transaction, Taxpayer incurred and paid Financial Advisor A a contingent fee of Amount E.

Pursuant to an engagement letter dated Date 5, Taxpayer engaged Financial Advisor B to provide financial advisory services with respect to the potential acquisition of an unidentified target (the "Financial Advisor B Engagement Letter"). Under the terms of the Financial Advisor B Engagement Letter, Taxpayer agreed to pay Financial Advisor B a fee of Amount F contingent upon the closing of a qualified transaction as defined in the Financial Advisor B Engagement Letter. Taxpayer was also required to pay Financial Advisor B a non-refundable fee of Amount G upon rendering a fairness opinion, which was creditable against the contingent fee. Prior to the closing of the Transaction, Financial Advisor B rendered a fairness opinion and was paid $Amount G by Taxpayer. Upon the closing of the Transaction, Taxpayer incurred and paid Financial Advisor B a contingent fee of Amount H.

Following the Transaction's closing, Taxpayer engaged Tax Advisor to prepare a transaction cost recovery analysis and advise on the appropriate tax treatment for certain costs incurred by Taxpayer in connection with the Transaction. Tax Advisor prepared a report summarizing the income tax treatment of various transaction costs incurred by Taxpayer and recommending that Taxpayer make an election to use the safe harbor method for allocating success-based fees set forth in Rev. Proc. 2011-29 with respect to the Amount E Financial Advisor A contingent fee and Amount H

Financial Advisor B contingent fee (together, the "Success-Based Fees"). Tax Advisor prepared the election statement required by section 4.01(3) of Rev. Proc. 2011-29 and advised Taxpayer to attach the statement to its timely filed Form 1120, *U.S. Corporation Income Tax Return,* for TY.

Taxpayer timely filed its TY Tax Return on Date 6. Taxpayer complied with the substantive requirements for the safe harbor election of Rev. Proc. 2011-29 by deducting 70 percent of the Success-Based Feed and capitalizing 30 percent of the Success-Based Fees on its TY Return. However, Taxpayer failed to attach the election statement to the TY Tax Return as required by section 4.01(3) of the Rev. Proc. 2011-29 when it inadvertently omitted the statement from the TY Tax Return's e-file package.

Taxpayer discovered the omission of the election statement in connection with the IRS audit of Taxpayer's TY Tax Return. More specifically, the examining agent issued a draft Information Document Request relating to the treatment of transaction costs and at a subsequent meeting asked whether Taxpayer had made a safe harbor election for allocating successes-based fees because the examining agent not remember seeing an election statement in the return. At the same meeting, Taxpayer provided the examining agent a copy of the table of contents of the transaction cost study performed by Tax Advisor, along with a copy of the election statement prepared by Tax Advisor, and advised the examining agent that it had made the safe harbor election for allocating success-based fees. Subsequently, Taxpayer reviewed the return and, acting in good faith, promptly notified the examining agent when it discovered that it had failed to include the election statement in the return. The examining agent discussed the issue with her manager, in addition to an Issue Practice Group Coordinator, and together they reached the conclusion that Taxpayer should request an extension of time to make the safe harbor election for allocating success-based fees under Treas. Reg. § 301.9100-3. The examining agent notified Taxpayer of this decision on Date 7.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations generally provide that no deduction shall be allowed for any amount paid out for property having a useful life substantially beyond the taxable year. In the case of an acquisition or reorganization of a business entity, costs that are incurred in the process of acquisition and that produce significant long-term benefits must be capitalized. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in § 1.263(a)-5(a). An amount is paid to facilitate a transaction described in § 1.263(a)-5(a) if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined

based on all of the facts and circumstances. See § 1.263(a)-5(b)(1).

Section 1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in § 1.263(a)-5(a) (success-based fee) is presumed to facilitate the transaction, and thus must be capitalized. A taxpayer may rebut the presumption by maintaining sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction, and thus may be deductible.

A taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate the transaction is a method of accounting under § 446. See section 2.04 of Rev. Proc. 2011-29.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Rev. Proc. 2011-29. Rev. Proc. 2011-29 provides a safe harbor method of accounting for allocating success-based fees paid in business acquisitions or reorganizations described in § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by § 1.263(a)-5(f), this safe harbor permits electing taxpayers to treat 70 percent of the success-based fee as an amount that does not facilitate the transaction, i.e., an amount that can be deducted. The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Rev. Proc. 2011-29 allows a taxpayer to make a safe harbor election with respect to success-based fees. Section 4.01 provides that the Service will not challenge a taxpayer's allocation of success-based fees between activities that facilitate a transaction described in § 1.263(a)-5(e)(3) and activities that do not facilitate the transaction if the taxpayer does three things. First, the taxpayer must treat seventy percent of the amount of the success-based fee as an amount that does not facilitate the transaction. Second, the taxpayer must capitalize the remaining amount of the success-based fee as an amount which does facilitate the transaction. Third, the taxpayer must attach a statement to its original federal income tax return for the taxable year the success-based fee is paid or incurred. This statement should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are deducted and capitalized. It is this third requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission to attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for TY to include a completed election statement.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section

301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Section 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that, in general, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer: (i) requests relief before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(3) provides that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer: (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. The interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the Government are

deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in § 1.263(a)-5(f) of the Income Tax Regulations. The Commissioner has the authority under §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

CONCLUSION

Based upon our analysis of the facts and representations provided, Taxpayer acted reasonably and in good faith. Further, granting relief will not prejudice the interests of the Government. Therefore, the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 60 days from the date of this ruling to file the statement required under section 4.01(3) of Rev. Proc. 2011-29 stating that it is electing the safe harbor treatment for success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized for TY.

CAVEATS

The rulings contained in this letter are based on information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether Taxpayer's Transaction is within the scope of Rev. Proc. 2011-29.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing its return electronically may satisfy this requirement by attaching a statement to its return that provides the date and control number of the letter ruling.

In accordance with the provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives. We are also

sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely yours,

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DAVID CHRISTENSEN
Assistant to Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes